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No. 91-43

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

DAVID COOK, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under Section 108(b) of the Deficit Reduction Act of 1984, as amended by Section 1808(d) of the Tax Reform Act of 1986, a commodities dealer may deduct putative "losses" incurred from participation in sham commodity "straddle" transactions lacking economic substance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-10A) is unreported.[1] The opinion of the Tax Court (Pet. App. 11A-32A) is reported at 90 T.C. 975.

[1] The court of appeals entered a revised opinion in this case on August 12, 1991. That opinion, which is attached as an Appendix to this brief, does not alter the judgment previously reached. It does, however, incorporate a more detailed exposition of the court's reasoning. Because the mandate was issued by the court of appeals on May 21, 1991, and has never been recalled by that court, the court may have lacked jurisdiction to enter its extensively revised opinion. See 5B C.J.S. *Appeal & Error* §§ 1995, 1996 (1958 & Supp. 1991).

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1991. The petition for a writ of certiorari was filed on July 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1976 and 1977, when petitioner was a commodities dealer in California, he participated in sham commodities tax straddle transactions on a London exchange. Along with at least 1400 other taxpayers, petitioner entered into a series of transactions designed to yield putative "losses" in the first year and offsetting "gains" in the next. By straddling the tax "losses" and "gains" over the two years, the objective was to derive tax benefits from transactions wholly lacking in economic substance. Because these transactions lacked economic substance, the Commissioner disallowed the deductions resulting from the claimed "losses." The Tax Court upheld the Commissioner's determination in *Glass* v. *Commissioner*, 87 T.C. 1087 (1986), which has now been affirmed by seven courts of appeals. See *Dewees* v. *Commissioner*, 870 F.2d 21 (1st Cir. 1989); *Friedman* v. *Commissioner*, 869 F.2d 785 (4th Cir. 1989); *Killingsworth* v. *Commissioner*, 864 F.2d 1214 (5th Cir. 1989); *Ratliff* v. *Commissioner*, 865 F.2d 97 (6th Cir. 1989); *Yosha* v. *Commissioner*, 861 F.2d 494 (7th Cir. 1988); *Keane* v. *Commissioner*, 865 F.2d 1088 (9th Cir. 1989); *Kirchman* v. *Commissioner*, 862 F.2d 1486 (11th Cir. 1989). Petitioner therefore concedes (Pet. App. 1A), as he must, that the transactions for which he claims a deduction were arranged solely for the purpose of generating putative tax losses and thus lack economic substance. See *Glass* v. *Commissioner*, 87 T.C. at 1153-1178.

2. After the Tax Court issued its decision in *Glass* v. *Commissioner*, petitioner was allowed to amend his petition to allege that, as a commodities dealer, he was entitled to deduct the putative "losses" even though the transactions lacked economic substance. Petitioner's amended claim is based upon Section 108 of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 630, as amended by Section 1808(d) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2817-2818. As amended, Section 108(a) provides that losses attributable to the disposition of one leg of a commodity straddle are deductible if incurred in a "trade or business" or in a "transaction entered into for profit." Section 108(b), as amended, provides that a "loss incurred by a commodities dealer * * * shall be treated as a loss incurred in a trade or business." Pet. App. 33A, 35A.

The Tax Court, in a reviewed opinion, held unanimously that, even though petitioner was engaged in a "trade or business" as a commodities dealer, he was not entitled to deduct the putative "losses" from his sham transactions under Section 108. In an opinion in which fourteen other judges joined, Judge Nims held that Section 108 does not allow losses incurred in prearranged transactions that lack economic substance to be deducted (Pet. App. 21A). Since offsetting gains had been prearranged, "[i]n effect, then, no losses were incurred." *Ibid.* Section 108(b) is therefore inapplicable because it "applies only to 'any loss' incurred by a commodities dealer" (Pet. App. 21A). This conclusion was supported by the legislative history of Section 108, which reflects that a deduction for losses incurred by dealers "would not be available in any cases where the trades were fictitious [or] prearranged" (Pet. App. 20A) (quot-

ing H.R. Rep. No. 426, 99th Cong., 2d Sess. 911 (1986)).

Judge Whitaker concurred in a separate opinion. He concluded that petitioner was not acting as a "commodities dealer" within the meaning of Section 108(b) when he engaged in the sham tax straddle transactions. The legislative history reflects that a dealer making a trade "*in violation of the rules of the exchange*" (Pet. App. 29A (quoting H.R. Rep. No. 426, *supra*, at 911)) would be outside the coverage of Section 108(b). Since the sham London trades did "not comport with the rules of trading in the United States," petitioner did not qualify as a "commodities dealer" in making these trades (Pet. App. 19A-30A).

In an additional concurring opinion in which nine other judges joined, Judge Wells stated that he agreed both with the majority that Section 108(b) did not apply to transactions that lacked economic substance and also agreed with Judge Whitaker that Section 108(b) did not apply because the London transactions "would have been in violation of the rules of domestic exchanges in the United States" (Pet. App. 30A).

3. The court of appeals affirmed. The court agreed "with the Tax Court majority that where the transaction was an economic sham, there was no 'loss,' even in year one" (Pet. App. 6A). Since there was no "loss," petitioner's status as a "commodities dealer" was not relevant (*id.* at 7A). The court noted that, under petitioner's reasoning, "a person who owned a seat on a commodities exchange during the relevant years would, by an economically meaningless shuffling of paper, have been relieved of any obligation to pay taxes at ordinary income rates"

(*id.* at 8A). Such a result is precluded by *Gregory* v. *Helvering*, 293 U.S. 465 (1935), and its progeny, which have long refused to give recognition to "paper transactions which have no purpose or economic consequence other than tax avoidance" (Pet. App. 9A). The court noted (*ibid.*) that the Second Circuit had reached the same conclusion in *DeMartino* v. *Commissioner*, 862 F.2d 400 (1988).

ARGUMENT

The court of appeals correctly held that petitioner is not entitled to deduct his purported commodity tax straddle losses because these transactions lack economic substance. This decision does not conflict with any decision of this Court or of the other courts of appeals. Further review is therefore not warranted.

1. This Court has long held that transactions that lack economic substance will not be recognized for tax purposes. See *Gregory* v. *Helvering*, 293 U.S. at 469. When a transaction represents "nothing more than a contrivance" in a scheme of tax avoidance, it will not be given effect. *Ibid.* Congress did not depart from this fundamental tenet of tax law in enacting Section 108(b).

As originally enacted, Section 108(a) provided that a loss on a straddle position was deductible if it was "part of a transaction entered into for profit" (Pet. App. 33A). Section 108(b), in turn, provided dealers with a rebuttable presumption that their positions were profit motivated (Pet. App. 33A). The Commissioner was thus free to introduce evidence to show that dealers did not have the requisite profit motive. In the Tax Reform Act of 1986, however, Section 108(a) was amended to provide that a loss on a straddle position is deductible if the loss is incurred

either in a "trade or business" or in a transaction "entered into for profit." Section 108(b) was similarly amended to provide that "any loss incurred by a commodities dealer in the trading of commodities shall be treated as a loss incurred in a trade or business." The purpose of the amendment was to eliminate the need for the "inherent[ly] difficult[]" inquiry into the profit motive of dealers for trades executed in the course of their customary business (H.R. Rep. No. 426, *supra*, at 910-911). The report of the House Ways and Means Committee makes clear, however, that Congress never intended that dealers who engage in straddle transactions that lack economic substance would be entitled to avail themselves of the provisions of Section 108(b). The report states (H.R. Rep. No. 426, *supra*, at 911):

> [T]he presumption would not be available in any cases where the trades were fictitious, prearranged, or otherwise in violation of the rules of the exchange in which the dealer is a member.

Petitioner mistakenly contends (Pet. 2, 11) that the court of appeals held that his trades lacked economic substance because he had no profit motive. The question whether a transaction has economic substance does not depend upon a subjective analysis of the taxpayer's motive but, instead, upon an objective analysis of whether the transaction has any economic effect *other than* avoiding taxes. See *Gregory* v. *Helvering*, 293 U.S. at 469-470. Neither the Tax Court nor the court of appeals based its decision in this case on the absence of any profit motive on the part of the investors. Instead, the courts held that the transactions, viewed as a whole, were designed and executed to produce nothing other than tax benefits (Pet. App. 9A, 16A, 20A).

2. Petitioner concedes (Pet. 7) that the decision in this case does not conflict with any decision of this Court or of any other court of appeals. Indeed, the only other courts to have considered this question have reached the same conclusion—that Section 108(b) does not allow a "loss" deduction for transactions that lack economic substance. See *DeMartino* v. *Commissioner*, 862 F.2d at 407; *Lerman* v. *Commissioner*, No. 90-1813 (3d Cir. July 17, 1991).

In *DeMartino*, the taxpayers "invested" in crude oil future straddles under a prearranged plan designed to create tax losses without any possibility that any genuine gain or loss would be realized. As the court observed, such transactions lack economic substance. 862 F.2d at 406. The court concluded that, in enacting Section 108(b), "Congress eliminated the profit motive inquiry in cases involving dealers because of the inherent difficulty involved in making such an inquiry, but it did not prevent inquiry into the economic substance of a dealer's commodity trading." 862 F.2d at 407. The Third Circuit recently reached the same conclusion in *Lerman* v. *Commissioner*, *supra*.

The decision in this case is also consistent with numerous decisions holding that Section 108 has no application to commodity transactions that lack economic substance.[2] See, *e.g.*, *Keane* v. *Commissioner*,

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[2] These decisions did not involve dealers. They hold, however, that Section 108(a) is inapplicable to transactions that lack economic substance because no genuine "loss" has occurred. Petitioner asserts (Pet. 7) that, while the courts of appeals in *Ratliff*, *Yosha*, and *Killingsworth* held that the taxpayers were not entitled to deduct their London option transaction losses under Section 108, they did not hold that Section 108 was inapplicable in the first instance. Petitioner suggests that the courts denied the deductions because the

865 F.2d at 1093; *Friedman* v. *Commissioner*, 869 F.2d at 791; *Kirchman* v. *Commissioner*, 862 F.2d at 1494; *Killingsworth* v. *Commissioner*, 864 F.2d at 1218; *Ratliff* v. *Commissioner*, 865 F.2d at 98; *Yosha* v. *Commissioner*, 861 F.2d at 499. See also *Dewees* v. *Commissioner*, 870 F.2d at 36. Further review is therefore not warranted.

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taxpayers in those cases failed to meet the profit motive test of Section 108(a). Petitioner concludes that "there clearly exists the potential of a future conflict" (Pet. 7).

Petitioner is mistaken. It is readily apparent from these decisions that the losses were disallowed because the transactions lacked economic substance. Only after this conclusion was reached did the courts—in response to the taxpayers' argument that they had the requisite profit motive—observe that the taxpayers also failed to satisfy the profit motive test of Section 108. Petitioner's speculation concerning a future conflict does not warrant this Court's review.

Petitioner also asserts (Pet. 7-8) that the court concluded in *Dewees* that the fact that the London option transactions lacked economic substance did not take them outside of Section 108(a). As petitioner eventually admits (Pet. 8), however, the *Dewees* court did not adopt this reasoning but, instead, merely described it as an alternative to the more traditional analysis that a transaction that lacks economic substance falls outside the scope of an otherwise applicable tax statute. See 870 F.2d at 36.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-70136

T.C. No. 3122-82

DAVID COOK, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

ORDER AND OPINION

Appeal from the United States Tax Court

Argued and Submitted
April 18, 1990—San Francisco, California

Memorandum Filed April 22, 1991
Order and Opinion Filed August 12, 1991

Before: Robert R. Beezer and Alex Kozinski, Circuit Judges, and Andrew J. Kleinfeld [1], District Judge.

Opinion by District Judge Kleinfeld

SUMMARY

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[1] The Honorable Andrew J. Kleinfeld, United States District Judge, District of Alaska, sitting by designation.

Income Taxes

Affirming a judgment of the Tax Court, the court of appeals held that a commodities dealer could not deduct losses on the first leg of a pre-1982 straddle, where the straddle was an economic sham transaction.

Appellant David Cook was a commodities dealer when he entered into commodities straddles on the London metals exchange. These straddles were economic shams but not factual shams. This meant that they were not intended to generate a trading profit, but the options really were bought and sold. The options to buy and sell are called legs. The tax avoidance strategy used by Cook included the sale of the loss leg before the end of the tax year, but the gain leg would be held until after the capital gains period had elapsed the next year. Trades would be timed to accomplish this tax objective, not to make a trading profit. The Tax Court found that the straddles were designed to delay income tax obligations by one year, and convert ordinary income into capital gains. Cook argued that changes made to the Deficit Reduction Act by the Tax Reform Act of 1986 allowed him to deduct the losses in the first year of these transactions, despite the lack of economic substance. Cook argued these changes mean that a commodity dealer's loss need no longer be part of a transaction entered into for profit."

[1] The statute in question has two branches, one for losses incurred in a trade or business, and the other for transactions entered into for profit. The court has previously construed the for profit branch of the statute, but not the trade or business branch. [2] The profit motive test is not applied until the court determines that the transaction is itself a bona fide transaction, not a sham. That means that if the

entire straddle is an economic sham, then there is no loss to recognize, so it does not matter whether the sham loss is incurred in a trade or business or not. [3] The court agreed with the Tax Court's reasoning that the relevant transaction is the entire commodity tax straddle scheme. [4] The court rejected Cook's argument that disallowance of economic sham losses for commodities dealers made a nullity of the trade or business branch of the statute in question. [5] However, the court did not need to reach the question of recognition of losses on such transactions, because its analysis did not depend on whether such transactions actually existed. It was unlikely that Congress meant anything different by its use of these terms of art in section 108 of the Deficit Reduction Act of 1984 as amended by the Tax Reform Act of 1986, from what the same terms have meant in section 165 for many years. [6] Were Cook's argument applied to section 165, it might suggest that losses incurred in any trade or business were deductible, even though the transactions generating the paper losses lacked any economic substance.

[7] Tax recognition is generally denied to paper losses in transactions having no economic effect, whether they take place in a trade or business or not, without ever reaching the issue of whether the transactions are motivated by profit. [8] Thus, the court applied the statute as voted by Congress and signed into law by the President, without an unreliable exploration of the intentions of various individual actors in the legislative process. [9] Because the court resolved the case by finding no "loss" capable of recognition for tax purposes, it did not reach Cook's second issue, whether section 108 as amended applies to straddle transactions on foreign exchanges.

ORDER

The memorandum disposition filed April 22, 1991, is, as revised, redesignated as an authored opinion by Judge Kleinfeld.

OPINION

KLEINFELD, District Judge:

The central issue in this appeal is whether a commodities dealer could deduct losses on the first leg of a pre-1982 straddle, where the straddle was an economic but not a factual sham. We have previously decided that persons other than commodities dealers could not take a deduction in similar circumstances. The statute includes a special provision for commodities dealers, which the taxpayer would construe to allow recognition of these losses. We conclude that the sham losses are not deductible, and affirm the decision below, *Cook v. Commissioner*, 90 T.C. 975 (1988). The Second Circuit reached the same conclusion in *DeMartino v. Commissioner*, 862 F.2d 400 (2d Cir. 1988).

Facts

The parties stipulated to all material facts. Cook was a commodities dealer when he entered into commodities straddles on the London metals exchange in 1976 and 1977. These straddles were economic shams but not factual shams. This means that they were not intended to generate a trading profit, but the options really were bought and sold.

A straddle is a purchase, at one time, of options to buy and to sell the same commodity. The two options are called positions, or legs, of the straddle. As the price of the commodity changes, one leg will become more valuable, and the other less. Profit can be

made when one leg gains more value than is lost on the other leg. Such a spread may occur because the legs are for purchase and sale at different times, or because the legs are closed out at different times.

In the tax avoidance strategy used in this case, the loss leg would be sold before the end of the tax year, but the gain leg would be held until after the capital gains period had elapsed the next year. Trades would be timed to accomplish this tax objective, not to make a trading profit. The mechanics of this kind of straddle are explained in *Dewees v. Commissioner*, 870 F.2d 21, 23-24 (1st Cir. 1989), and *Glass v. Commissioner*, 87 T.C. 1087, 1107-1117 (1986). The Tax Court found that the straddles in the case at bar were designed to delay income tax obligations by one year, and to convert ordinary income into capital gains.

Cook's broker, Competex, gave an example in its promotional literature of trades designed to use a $12,000 investment to generate a $100,000 first year short term loss, followed by an $88,000 long term capital gain in the second year. This would produce a net tax saving of $28,000 for the 50% bracket taxpayer. The investor's entire $12,000 would be absorbed for premiums and commissions, so he would get no money back, only paper, but his economic advantage from tax savings would still be a net of $16,000. *See Glass v. Commissioner*, 87 T.C. 1087, 1110 (1986).

Cook's statutory argument

Cook argues that a 1986 statutory change allows him to deduct the losses in the first year of these transactions, despite the lack of economic substance. The argument rests upon the changes made in section 108 of the Deficit Reduction Act of 1984 by the Tax Reform Act of 1986.

Section 108 of the Deficit Reduction Act of 1984 applies specifically to pre-1982 straddles. Before the 1986 change, subsection (a) said that "in the case of any disposition" of a pre-1982 position, "any loss from such disposition shall be allowed for the taxable year of the disposition if such position is part of a transaction entered into for profit." Deficit Reduction Act of 1984, Pub.L. 98-369, § 108(a) 98 Stat. 494, 630 (1984). This provision allowed the loss to be taken when the first leg was sold, even though the first leg was part of a straddle transaction which would not be fully closed out until the other leg was sold. The critical qualification in this provision was the phrase, "if such position is part of a transaction entered into for profit." This language plainly excluded transactions lacking economic substance from the benefit of subsection (a).

Subsection (b) of the 1984 Act said that "for purposes of subsection (a), any position held by a commodities dealer . . . shall be rebuttably presumed to be part of a transaction entered into for profit." This provision created a presumption in favor of a commodities dealer, but since the presumption was rebuttable, the "for profit" qualification in the statute still applied to a dealer. Cook makes no claim to a deduction for the loss leg under the statute as it stood in 1984.

Cook's theory arises out of changes in section 108 made by the Tax Reform Act of 1986, Pub.L. 99-514, § 1808(d), 100 Stat. 2085, 2817, § 1808(d) (1986). The 1986 Act struck the language in subsection (a), "if such position is part of a transaction entered into for profit." It substituted "if such loss is incurred in a trade or business, *or* if such loss is incurred in a transaction entered into for profit though not con-

nected with a trade or business." *Id.*, § 1808(d)(1) (emphasis added).

Subsection (b) was also amended. The new provision eliminated the "rebuttably presumed" language for commodities dealers, and provided instead that "[f]or purposes of subsection (a), any loss incurred by a commodities dealer in the trading of commodities shall be treated as a loss incurred in a trade or business." The changes were retroactive.

Cook argues that these changes mean that a commodities dealer's loss need no longer be part of a "transaction entered into for profit." He argues that (1) a commodities dealer's disposition of the loss leg must be treated as incurred in a trade or business, and (2) the "for profit" requirement does not apply to a disposition incurred in a trade or business, so (3) a commodities dealer's loss on a disposition must be recognized, even though not part of a transaction entered into for profit.

The relevant portion of section 108 of the 1984 Act, as amended by section 1808 of the 1986 Act, reads:

> (a) GENERAL RULE.—For purposes of the Internal Revenue Code of 1986 [formerly I.R.C. 1954], in the case of any disposition of 1 or more positions—
>
> > (1) which were entered in before 1982 and form part of a straddle, and
> >
> > (2) to which the amendments made by title V of the Economic Recovery Tax Act of 1981 . . . do not apply,
>
> any loss from such disposition shall be allowed for the taxable year of the disposition if such loss is incurred in a trade or business, or if such

loss is incurred in a transaction entered into for profit though not connected with a trade or business.

(b) LOSS INCURRED IN A TRADE OR BUSINESS.—For purposes of subsection (a), any loss incurred by a commodities dealer in the trading of commodities shall be treated as a loss incurred in a trade or business.

26 U.S.C. § 1092 note (1988).

Cook argues that without his construction, the "trade or business" branch of subsection (a) would be a nullity, because any disposition by a commodities dealer other than an economic sham transaction would be covered by the "for profit" branch.

Analysis

The statute has two branches, one for losses incurred in a trade or business, and the other for transactions entered into for profit. We have previously construed the for profit branch of the statute, but not the trade or business branch. Despite the distinction, our previous decision compels our result under the trade or business branch.

In *Keane v. Commissioner of Internal Revenue*, 865 F.2d 1088 (9th Cir. 1989), we held that the profit motive test is not applied until the court determines that the transaction is itself a bona fide, not a sham. *See Id.* at 1092, quoting *Sochin v. Commissioner*, 843 F.2d 351, 354, n. 6 (9th Cir. 1988). We found that the Tax Court "correctly considered the entire two-year sequence of transactions when it determined that the London option transactions lacked economic substance and were designed merely to create a deductible losses." *Keane* at 1091. This analysis means

that if the entire straddle is an economic sham, then there is no loss to recognize, so it does not matter whether the sham loss is incurred in a trade or business or not.

Our decision in *Keane* was an affirmance of *Glass v. Commissioner*, 87 T.C. 1087 (1986).[2] *Glass* involved customers for these London metals exchange tax shelters who were not commodities dealers. The Tax Court held that "the relevant transaction was petitioners' entire commodity tax straddle scheme." *Id.* at 1163. The Tax Court noted the parallel between the revised language on straddles and the general provision on deductibility of losses:

> The amended section 108(a) expressly distinguishes between a loss incurred by a commodities dealer in the trade or business of trading commodities and a loss incurred in a commodities transaction entered into for profit though not connected with a trade or business. Thus, the language of section 108(a) is now completely harmonized with that of section 165(c)(1), which allows losses incurred in a trade or business, and section 165(c)(2), which allows losses incurred in any transaction entered into for profit, though not connected with a trade or business.

Glass at 1166. We find the Tax Court's reasoning persuasive.

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[2] Other Circuits have also affirmed *Glass*. *See Dewees v. Commissioner*, 870 F.2d 21 (1st Cir. 1989); *Friedman v. Commissioner*, 869 F.2d 785 (4th Cir. 1989); *Killingsworth v. Commissioner*, 864 F.2d 1214 (5th Cir. 1989); *Ratliff v. Commissioner*, 865 F.2d 97 (6th Cir. 1989; *Yosha v. Commissioner*, 861 F.2d 494 (7th Cir. 1988); *Kirchman v. Commissioner*, 862 F.2d 1486 (11th Cir. 1989).

In *Cook v. Commissioner*, 90 T.C. 975 (1988), the Tax Court held that even though a commodities dealer did not need to satisfy the "for profit" requirement under the 1986 Act, he still needed a "loss" *Id.* at 986. A concurring opinion in *Cook* reasoned that, where the transaction was an economic but not a factual sham, losses had to be recognized for one year, to give meaning to the commodities dealer branch of section 108. The concurring opinion would have held that the provision applied only to trades on domestic exchanges, not to trades on unregulated foreign exchange. *Id.* at 989-993.

Cook argues, along the lines of this concurring opinion, that disallowance of economic sham losses for commodities dealers makes a nullity of the trade or business branch of section 108. This argument challenges us to imagine a transaction by a commodities dealer which generates a recognizable loss, yet the loss is not incurred in a transaction entered into for profit.

There may such losses. A *commodities dealer might, for example,* "lay off" trades with customers, by setting off a buy on the market against a sale to a customer, and vice versa, to avoid market risk to himself. *See Dewees v. Commissioner*, 870 F.2d 21, 23-24 (1st Cir. 1989). The intended profit for the dealer might be from commissions or other aspects of business as a commodities dealer, rather than from the particular trades.

We need not reach the question of recognition of losses on such transactions, because our analysis does not depend on whether such transactions actually exist. The words of the statute now precisely track the formula of § 165(c)(1) and (2) of the Code:

> § 165(c) LIMITATION OF LOSSES OF INDIVIDUALS.—In the case of an individual, the deduction under subsection (a) shall be limited to—
>
> > (1) losses incurred in a trade or business;
> > (2) losses incurred in any transaction entered into for profit, though not connected with a trade or business . . . .

26 U.S.C. § 165 (1988). It is unlikely that Congress meant anything different by its use of these terms of art in section 108 of the 1984 Act as amended by the 1986 Act, from what the same terms have meant in section 165 for many years.

Were Cook's argument applied to section 165, it might suggest that losses incurred in any trade or business were deductible, even though the transactions generating the paper losses lacked any economic substance. Cook's construction might also mean that a person who owned a seat on a commodities exchange during the relevant years could, by an economically meaningless shuffling of paper, shelter his income from ordinary income rates. In light of the long established construction of section 165, these unlikely interpretations of the intent of section 108 cannot withstand the parallel between section 108 as amended and section 165.

Tax recognition is generally denied to paper losses in transactions having no economic effect, whether they take place in a trade or business or not, without ever reaching the issue of whether the transactions are motivated by profit. See *Gregory v. Helvering*, 293 U.S. 465 (1935). Once Congress amended section 108 in 1986 to make the language on commodities straddles track the traditional section 165 language, it eliminated the need to construe section 108

in a fashion distinct from section 165. *Cf. Landreth v. Commissioner*, 859 F.2d 643, 648 (9th Cir. 1988) (after the 1986 amendment, "the 'entered into for profit' language in section 108 should be interpreted in the same way as the identical language in section 165(c)(2)."); *Miller v. Commissioner*, 836 F.2d 1274 (10th Cir. 1988); *accord Glass*, 87 T.C. at 1166.

Cook suggests that we accept his construction based upon remarks in the legislative history. The legislative history, though, is considerably harder to construe than the statute. Remarks on the floor by Senators and Representatives cast doubts on which parts of the legislative history should be used. *See Landreth v. Commissioner*, 859 F.2d 643, 646 n.8 (9th Cir. 1988). We apply the words of the statute as voted upon by both Houses and signed into law by the president, without an unreliable exploration of the intentions of various individual actors in the legislative process. *See Miller v. United States*, 836 F.2d 1274, 1281-1282 (10th Cir. 1988).

We construe the word "loss" in section 108 in accord with the ordinary English meaning of the word, its structural parallel in section 165 of the Code, and the 55 year old *Gregory* tradition. In an economic sham transaction, there is no recognizable loss in section 165, so there is none under the parallel language in section 108.

Because we resolve the case by finding no "loss" capable of recognition for tax purposes, we do not reach Cook's second issue, whether section 108 as amended applies to straddle transactions on foreign exchanges.

Affirmed.

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